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APPELLANT PRO SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS HOGSTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0601-PC-00042
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
CRIMINAL DIVISION 6  
The Honorable Jane Magnus-Stinson, Judge  
The Honorable Jeffrey Marchal, Master Commissioner  
Cause No. 49G06-0209-PC-236496

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**February 2, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

In this pro se appeal, Appellant, Thomas Hogston, challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Hogston claims that the post-conviction court erred by denying his claims of prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel.

We affirm.

Our opinion in Hogston's direct appeal instructs us as to the underlying facts and procedures leading to this post-conviction appeal:

“ On September 3, 2002, Mitzi Diehl twice called the police on Hogston, her longtime boyfriend, after he took the cigarette case in which she kept her money. Diehl later telephoned Hogston, who told her that he wanted to talk with her. The next day, Hogston arrived at Diehl's residence. When Diehl entered Hogston's pickup truck, he struck her in the right eye with a closed fist. Hogston drove off and threatened to beat Diehl near an abandoned building 'because it's in the middle of nowhere and [she] would just die.' Tr. at 31. Diehl persuaded him not to do so, and Hogston drove to his house. Diehl stumbled and fell as she walked toward the house. Hogston stomped on Diehl's abdomen five or six times and said, 'Get up, bitch. I should kill you. Call the police on me. You know I'd bring your cigarette case back. You know I wouldn't steal from you.' Id. at 34. Diehl stayed at Hogston's house that evening and eventually went to a friend's house. Diehl's abdominal pain progressively worsened to the point that she was unable to get out of a chair or walk without doubling over and holding her stomach. Diehl's friend took her to the hospital, where she received a CAT scan and recounted Hogston's actions to her treating physicians.

On February 5, 2003, the scheduled trial date, Hogston's counsel moved for a continuance, stating that he had believed the case would 'probably' be dismissed and had failed to subpoena witnesses. Id. at 4-10. The trial court denied the motion and found Hogston guilty of Class C felony battery, Class A misdemeanor battery, and Class D felony criminal recklessness. The trial court merged the criminal recklessness conviction with the Class C felony battery conviction and entered judgment on the battery convictions.

On February 11, 2003, Hogston filed a motion alleging that Diehl had informed his counsel that the State and her mother had coerced her into testifying untruthfully at trial. On March 7, 2003, the trial court heard

testimony and denied Hogston's request to set aside its judgment.” Hogston v. State, No. 49A04-0304-CR-162 (Ind. Ct. App. Dec. 3, 2003), slip op. at 2-3 (footnote omitted).

Upon direct appeal, this court denied Hogston's challenges to his convictions and sentence. Hogston's claims upon direct appeal, among other things, were that the trial court erred in denying relief based upon post-trial testimony of State coercion of a witness, and also that he received ineffective assistance of trial counsel on various grounds. Hogston, slip op. at 4-8.

According to the chronological case summary (CCS), on September 29, 2004, Hogston filed his petition for post-conviction relief.<sup>1</sup> Following an August 5, 2005 hearing, the trial court denied Hogston's petition for post-conviction relief in a November 16, 2005 ruling. Hogston filed his notice of appeal on December 27, 2005.<sup>2</sup>

Upon appeal, Hogston claims that the post-conviction court erred in granting relief based upon his claims of prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel.<sup>3</sup> The State responds that Hogston's

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<sup>1</sup> This petition does not appear in the Appendix. See Ind. App. R. 50(A)(2)(f), (h). The post-conviction court stated in its ruling that the issues presented in the petition were (1) prosecutorial misconduct; (2) abuse of discretion by the trial court; and (3) ineffective assistance of appellate counsel. Hogston claims in his brief that his petition included the above three claims, as well as an additional claim of ineffective assistance of trial counsel.

<sup>2</sup> Hogston states in his brief that he filed his notice of appeal with the Miami Correctional Facility's law library on December 12, 2005, and that the trial court recognized it was timely on December 27, 2005. Although he provides no documentation to this effect, the State does not contest the timeliness of this appeal.

<sup>3</sup> While Hogston initially states in his brief that four issues are presented for review, specifically prosecutorial misconduct, abuse of discretion by the trial court, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel, his brief focuses only upon his claims of prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. A party waives an issue where the party fails to develop a cognizable argument or provide adequate citation

claims for relief based upon prosecutorial misconduct and ineffective assistance of trial counsel are unavailable for post-conviction review, and that his claim of ineffective assistance of appellate counsel is waived for failure to present a cognizable argument.

In turning to Hogston's claims before us, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. Godby v. State, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), trans. denied. To the extent the post-conviction court denied relief in the case at hand, Hogston is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole ““leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.”” Id. at 482 (quoting Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Id.

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001). If an issue was known and available, but not raised on direct appeal, it is waived. Id. If it was raised on appeal, but decided adversely, it is res judicata. Id. A claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding if such

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to authority and portions of the record. Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), trans. denied; Ind. App. R. 46(A)(8)(a). We therefore review only the three claims argued in Hogston's brief and deem his claim of abuse of discretion by the trial court waived.

claim is not raised on direct appeal. Id. A claim of ineffective assistance of appellate counsel is an appropriate issue for post-conviction review. Id.

To prevail upon a claim of ineffective assistance of counsel, Hogston must present strong and convincing evidence to overcome the presumption that counsel's representation was appropriate. Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), trans. denied. In assessing such claims, we follow the two-pronged test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984). Id. A defendant claiming a violation of the right to effective assistance of counsel must show that counsel's deficient performance prejudiced the case. Id. In order to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. This same standard is applicable to claims of ineffective assistance of appellate counsel. Id.

Hogston's first challenge is to the post-conviction court's denial of his claim of prosecutorial misconduct.<sup>4</sup> In denying this claim, the post-conviction court deemed it waived because this claim was available to Hogston on direct appeal. In post-conviction proceedings, a petitioner may assert prosecutorial misconduct only in the context of ineffective assistance of counsel. Allen v. State, 791 N.E.2d 748, 755 (Ind. Ct. App. 2003). While Hogston also frames this issue in terms of fundamental error, we further note that, in post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective

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<sup>4</sup> In spite of his claim to the contrary, Hogston does not frame this claim in terms of ineffective assistance of counsel.

counsel or issues demonstrably unavailable at the time of trial or direct appeal. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002), cited in Woodson v. State, 778 N.E.2d 475, 477 (Ind. Ct. App. 2002). Hogston has made no showing that his claims were demonstrably unavailable upon direct appeal. Indeed, upon direct appeal, Hogston sought relief based upon post-trial testimony regarding alleged coercion by the State, and we denied that claim. Hogston, slip op. at 3-6. Accordingly, we deem Hogston's claim of prosecutorial misconduct and fundamental error waived and affirm the post-conviction court's refusal to address this claim on the merits. See Timberlake, 753 N.E.2d at 597.

Hogston's second challenge is to the post-conviction court's denial of his claim of ineffective assistance of trial counsel. Hogston's claim of ineffective assistance of trial counsel focuses upon trial counsel's alleged failure to prepare adequately for trial, including by subpoenaing witnesses, as well as counsel's alleged failure to make proper objections at trial.

As the State points out, Hogston claimed ineffective assistance of trial counsel in his direct appeal. To the extent Hogston's claims of ineffective assistance of trial counsel were addressed by our court upon direct appeal, our decision is res judicata, and we affirm on that ground. See Timberlake, 753 N.E.2d at 597. To the extent Hogston's instant claims vary from those brought before and addressed by our court on direct appeal, we note that Hogston is foreclosed from claiming ineffective assistance of trial counsel in his post-conviction appeal after already having raised an ineffective assistance issue in his direct appeal. See Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998), cert.

denied, 528 U.S. 861 (1999). We therefore affirm the post-conviction court’s denial of relief on this ground.

Hogston’s third and final challenge is to the post-conviction court’s denial of his claim of ineffective assistance of appellate counsel. Aside from stating that this claim is “viable and valid,” Hogston presents us with no cognizable argument in his brief indicating the grounds for his challenge to the post-conviction court’s ruling on this point.<sup>5</sup> Appellant’s Brief at 39. We further note that the record does not even contain a copy of Hogston’s post-conviction petition. A party waives an issue where the party fails to develop a cognizable argument or provide adequate citation to authority and portions of the record. Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), trans. denied; Ind. App. R. 46(A)(8)(a). We therefore deem this claim waived.

The judgment of the post-conviction court is affirmed.

ROBB, J., and BARNES, J., concur.

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<sup>5</sup> We recognize that Hogston stated in his Summary of Argument that appellate counsel was ineffective for failing to raise various ineffective assistance of trial counsel claims and for “declaring to Hogston that [prosecutorial misconduct] should be raised as a post-conviction relief issue.” Appellant’s Brief at 12. We also recognize that appellate counsel stated at the post-conviction review hearing that he believed any claim of prosecutorial misconduct “should be saved possibly for pcr,” and the post-conviction court appeared to endorse this “strategic decision.” Tr. at 125; App. at 10. While claims of prosecutorial misconduct are properly presented upon direct appeal only, appellate counsel did seek relief upon direct appeal based upon a claim of State coercion of a witness, as the post-conviction court noted, and we denied that claim. Hogston, slip op. at 3-6.